IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXANDER TITTENSOR, et al.	CIVIL ACTION
V.	NO. 02-CV-8011
COUNTY OF MONTGOMERY of the COMMONWEALTH of PENNSYLVANIA, et al.	

MEMORANDUM AND ORDER

McLaughlin, J. September 8, 2003

Christian and Oksana Tittensor bring this action individually and on behalf of their minor children, Alexander and Nina, alleging that the children contracted the Escherichia coli ("E. coli") bacteria on a visit to Merrymead Farm, a private petting *zoo* in Lansdale, Pennsylvania. Federal jurisdiction is based on their section 1983 claim that the County of Montgomery, Pennsylvania, the Montgomery County Health Department ("MCHD"), and MCHD employees Robert Gage and Kelly Laverdure (the "government defendants") violated their due process rights by failing to take appropriate steps to prevent the transmission of the bacteria. The plaintiffs also sued Merrymead Farm, Inc., Merrymead Farm Associates, the Rothenberger Family Partnership, individual principals of Merrymead Farm Associates (the "Merrymead defendants"), and Dale Calvin Streams on several state law tort theories.

All the defendants, except Kelly Laverdure, have moved to dismiss the complaint.[1] The Court will grant the government defendants' motion to dismiss the section 1983 claim for failure to state a claim, and declines to exercise its supplemental jurisdiction over the state law claims. It will, therefore, dismiss the entire complaint.

This case requires the Court to consider the state-created danger exception to the rule set down in DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-97 (1989), that states do not have an affirmative obligation to ensure that substantive due process rights are not violated by private actors. The Court concludes that the government defendants did not create the opportunity for the E. coli bacteria to infect the Tittensor children. At most, the allegations of the amended complaint show that the government defendants took no steps to eliminate the risk or warn the public about it. This type of conduct is not enough to come within the state-created danger exception to the DeShaney rule.

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[1] Kelly Laverdure's attorney entered an appearance in this action, but Ms. Laverdure never moved for dismissal. At oral argument, the plaintiffs' counsel stated that if the Court dismissed the section 1983 claim against the other government defendants, the plaintiffs would likely move to dismiss Ms. Laverdure as well. Hr'g Tr. at 51-52.

I. The Complaint

A. Facts

Merrymead Farm is a petting zoo in Lansdale, Pennsylvania that maintains a variety of farm animals, including cows, calves, pigs, donkeys, and chickens. Visitors to Merrymead are permitted to touch and pet the farm's animals. Am. Compl. at ¶¶ 10, 28.

In September 2000, defendant Kelly Laverdure, a Disease Intervention Specialist employed by MCHD, identified Merrymead Farm as the source of an outbreak of the bacteria E. coli. Laverdure notified her supervisors of the E. coli outbreak among Merrymead patrons and entered her findings about the outbreak into a computer system. In doing so, she acted according to MCHD custom and policy. Beyond this, no one at MCHD, including Laverdure, her superiors, or Robert Gage, the Director of MCHD, took steps to prevent the spread of E. coli to Merrymead visitors. Am. Compl. at ¶¶ 38, 41, 42.

On or about October 22, 2000, the Tittensors took their minor children, Alexander and Nina, to visit Merrymead Farm. Alexander and Nina are currently four and three years old, respectively. The two children came into contact with the Merrymead animals. The entire family also ate lunch at Merrymead's food facility. Following the visit, Alexander and Nina suffered E. coli infections for which they had to be

hospitalized, and for which continued medical monitoring is necessary. Am. Compl. at ¶¶ 2, 3, 30, 32, 33, 34, 35, 62, 72.

B. Claims

The Tittensors set forth five claims in their amended complaint.

Their first claim under section 1983 is for the government defendants' failure to take appropriate action to prevent Alexander's and Nina's E. coli infections. They allege that the government defendants failed to implement necessary remedial measures. These included: (1) failing to adequately investigate the E. coli outbreak; (2) failing to notify the public about the outbreak at Merrymead; and (3) failing to advise the Merrymead defendants on how to contain and eliminate the bacteria. The Tittensors further allege that the government defendants failed to properly train MCHD Director Gage and Disease Intervention Specialist Laverdure.

The Tittensors' second claim is for negligence against the Merrymead defendants. The Tittensors allege that the Merrymead defendants knew or should have known that E. coli was present on the Merrymead premises before the Tittensors' visit. Furthermore, Merrymead failed to take appropriate steps to eliminate the risk of E. coli infection among its visitors.

The Tittensors' third claim is for negligence against

Dale Calvin Streams. Streams was the veterinarian hired by Merrymead to inspect and conduct tests upon the Merrymead livestock. He is alleged to have failed to diagnose the presence of E. coli and advise Merrymead on how to eliminate the bacteria.

The fourth claim is brought by Christian and Oksana Tittensor for emotional distress suffered as a result of witnessing the harm to their children.

Finally, the fifth claim is brought by Christian and Oksana Tittensor and is for loss of consortium.

II. Analysis[2]

Section **1983** provides a civil action remedy for deprivation of constitutional rights and rights arising under federal law by state actors. **42** U.S.C. § 1983. It does not entail substantive protections, but merely serves as a remedial measure for plaintiffs alleging a violation of rights that exist elsewhere in constitutional and federal law. Brown v. Commonwealth of PA Dep't of Health Emergency Med. Servs., 318 F.3d **473, 477 (3d** Cir. 2003).

The first step in analyzing a section 1983 claim is to

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[2] In deciding a Fed. R. Civ. P. Rule 12(b)(6) motion, the Court must accept the allegations in the plaintiffs' complaint as true. The complaint should be dismissed only if the plaintiffs could not prove any set of facts consistent with the allegations entitling them to relief. Hishon v. Spalding, 467 U.S. 69, 73 (1984); Malia v. Gen. Electric Co., **23** F.3d 828, **830** (3d Cir. 1994).

identify the exact nature of the right the plaintiff alleges to have been violated. Graham v. Connor, 490 U.S. 386, 394 (1989). Here, the Tittensors contend that the government defendants violated their minor children's substantive due process rights under the Fourteenth Amendment. Substantive due process protects citizens' rights to life, liberty, and property. The Tittensors' theory is that Alexander and Nina had a liberty interest in being free from transmission of infectious diseases. This liberty interest was violated by the government defendants' failure to act appropriately to prevent Merrymead visitors from being exposed to the bacteria.

The Court's analysis must start with DeShanev. In DeShanev, the Supreme Court held that states do not have an affirmative obligation to ensure that substantive due process rights are not violated by private actors. The Court formulated this non-liability rule in the context of a section 1983 action brought by a victim of child abuse against a municipal social services agency and its employees. Joshua DeShaney alleged that the defendants knew that his father abused him but they failed to remove him from his father's care. The Court held that the Due Process Clause does not require states to tender aid, "even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShanev, 489 U.S. at 196, 191-93.

The Third Circuit has developed two exceptions to the DeShaney non-liability rule. The first exception is the special relationship exception. It applies when the state holds a person in custody against his will, or otherwise restrains a person's liberty such that he is unable to care for himself. Brown, 318 F.3d at 481. The plaintiffs concede that the facts of the amended complaint do not fit within the special relationship exception.

The second exception to the DeShaney non-liability rule is the state-created danger exception. There are four elements that must be satisfied for the state-created danger exception to apply: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff;[3] and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. Kneipp, 95 F.3d at 1208.

The government defendants argue that the factual

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[3] Although the third element of the state-created danger test sounds similar to the special relationship exception, it has a different meaning. The third element requires some contact such that the plaintiff is a foreseeable tort victim of the defendant's conduct. Kneipp v. Tedder, 95 F.3d 1199, 1209 n. 22 (3d Cir. 1996). In contrast, the special relationship exception applies only where the plaintiff is subject to the custodial care of the state.

allegations in the Tittensors' amended complaint do not satisfy any of the elements of the state-created danger test. In particular, the government defendants focus on the second and fourth elements of the test. They assert that their alleged conduct amounts to no more than negligence, and that they did not create the danger to which the Tittensors were exposed. Because the court concludes that the government defendants did not use their authority to create the opportunity for danger to befall the Tittensors, it will not decide whether the government defendants' alleged conduct meets the culpability standard.

The fourth element requires a showing that the state actors used their authority to create an opportunity for a third party to harm the plaintiffs. The emphasis here is on the verb "create." state actors must behave in such a way as to make plaintiffs more susceptible to harm. It is not enough for state actors to have knowledge of a risk of harm, or to remedy inadequately a harm. They must "create" the opportunity for the harm to strike plaintiffs.

Here, the Tittensors' amended complaint does not demonstrate that the government defendants created the opportunity for the E. coli bacteria to infect the Tittensor children. At most, the amended complaint sets forth facts showing that the government defendants knew about the E. coli outbreak at Merrymead, but took no steps to eliminate it or warn

the public. The amended complaint catalogues a series of ameliorative actions that the government defendants could have taken, but nowhere does it state facts sufficient to show that the government defendants created the risk of E. coli infection. Am. Compl. at ¶¶ **36, 40-43, 46.**

Case law from the Court of Appeals supports the Court's finding that the factual allegations in the Tittensors' amended complaint do not satisfy the fourth element of the state-created danger test. In cases in which the Third Circuit has held the fourth element satisfied, the harm that the plaintiffs suffered was directly traceable to the intervention of state actors.

For instance, in Kneipp, Mrs. Kneipp and her husband were returning home after an evening of drinking when they were detained by the police. Mr. Kneipp was permitted to continue his walk home to relieve his babysitter, while an intoxicated Mrs. Kneipp remained with the police officers. The officers were aware of Mrs. Kneipp's intoxicated state and her need for assistance in continuing her walk home, but they did not provide it. Subsequently, Mrs. Kneipp fell unconscious and suffered hypothermia, which led to permanent brain damage. The Third Circuit held that a jury could find that the police created the risk of harm that Mrs. Kneipp suffered because absent police intervention, Mrs. Kneipp's husband would have continued to escort her home. Kneipp, **318** F.3d at **1201-03; 1208-11.**

Similiarly, in Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003), the Third Circuit held that a jury could find that state police officers created the opportunity for Mr. Smith to suffer a fatal heart attack because they used extreme methods to try to coerce him out of his home. Although the officers knew that Mr. Smith suffered from poor health, they surrounded his home with sharpshooters and would not permit family members to attempt to communicate with him. Estate of Smith, 318 F.3d at 502-03; 510.

The Tittensors' allegations are distinguishable from the facts of Kneipp and Estate of Smith. In both Kneipp and Estate of Smith, state actors increased the plaintiffs' vulnerability to harm by depriving Mrs. Kneipp of an escort home and subjecting Mr. Smith to an aggressive show of force. Here, the government defendants did not act in such a way as to put the Tittensors in a worse position. Even if the government defendants failed to respond adequately to the outbreak, that failure did not create the danger of contracting E. coli. The bacteria was already present at Merrymead Farm and the government defendants are not alleged to have contributed to its growth at Merrymead or its transmission to visitors.

The allegations in the Tittensors' amended complaint are more analogous to those in Morse v. Lower Merion School District, 132 F.3d 902 (3d Cir. 1997). In Morse, a teacher in a

child care center was fatally shot by a mentally ill woman who entered the building through an unlocked back entrance. Mrs. Morse's executor brought a section 1983 action arguing that the unsecured entrance was a state-created danger. The Third Circuit held that the fourth element of the state-created danger test was not met because there was no causal connection between the defendants' failure to lock the door and the harm that Mrs. Morse suffered. Morse, 132 F.3d at 904-05; 914-16.

Similarly, the Tittensors cannot show that the government defendants' lack of responsiveness to the E. coli outbreak caused their minor children to contract the bacteria. The government defendants did not bring about the E. coli outbreak just as the defendants in Morse did not cause a mentally ill woman to commit murder. See also Kepner v. Houstoun, 164 F. Supp.2d 494 (E.D. Pa 2001), aff'd sub nom. Jordan v. Houstoun, 39 Fed.Appx. 795 (3d Cir. 2002) (government defendants did not create the risk of harm where they knew about the dangerous propensities of a former employee but took no action to notify his victims that he was on the premises).

The Tittensors rely on Sciotto v. Marple Newtown Sch. Dist., 81 F. Supp.2d 559 (E.D. Pa 1999) to support their argument that they have satisfied the fourth element of the state-created danger test. In Sciotto, the plaintiff was a high school wrestler who became a quadriplegic as a result of a wrestling

match in which he was paired with an alumnus of the wrestling team who had college wrestling experience. The court ruled that a reasonable jury could find that school officials had created the opportunity for the plaintiff to be injured by permitting older, more experienced wrestlers to practice with the high school team. Sciotto, 81 F. Supp.2d at 561-62; 566-67.

Sciotto is distinguishable from the Tittensors' allegations. In Sciotto, the wrestling team's head coach invited the alumni to attend the team's practice sessions. Sciotto, 81 F. Supp.2d at 561-62. The government defendants here, however, did not create the E. coli outbreak at Merrymead or participate in any way in aggravating it.

The Tittensors cited two additional cases at oral argument that they assert supports their position on the fourth element of the state-created danger test. Neither case does so, however. Natale v. Camden County Correctional Facility, 318 F.3d 575 (3d Cir. 2003), involved a claim by a diabetic prisoner that he suffered a stroke because prison officials failed to administer insulin to him. The Third Circuit evaluated Natale's section 1983 claim under the legal standard used to evaluate convicted prisoners' claims of a violation of their Eighth Amendment rights to adequate medical care. The state-created danger exception to the DeShaney non-liability rule was not an issue in the case. Natale, 318 F.3d at 578; 582.

In Susavage v. Bucks County Sch. Intermediate Unit, No. 00-6217, 2002 U.S. Dist. LEXIS 1274 (E.D. Pa Jan. 22, 2002), the plaintiffs' minor daughter, Cynthia, had musculo-skeletal infirmities which prevented her from sitting upright by herself. In order to transport her to school, the school district strapped her into a special harness that resulted in ultimately fatal injuries. The school district created the harm that Cynthia suffered by supplying the harness and placing her in it without properly evaluating her for it.

During the oral argument on the motion, the Tittensors sought the Court's permission to amend the complaint a second time. They wish to include new facts alleging that the Merrymead defendants consulted the government defendants about whether they should close Merrymead to the public during the E. coli outbreak. The Tittensors would allege that the government defendants responded that closing Merrymead was not necessary and that providing hand washing facilities and posting signs would suffice to protect the public. Even with these additional facts, the Tittensors still do not satisfy the fourth element of the state-created danger test. In dispensing such advice to the Merrymead defendants, the government defendants would not have increased the Tittensors' vulnerability to harm.[4]

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[4] Indeed, the plaintiffs allege that the Merrymead defendants neither properly warned them about the risk of E. coli exposure, nor provided adequate hand washing and sanitary

Since the Tittensors cannot allege facts sufficient to establish the state-created danger exception, the Court dismisses their section 1983 action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Since the Court is dismissing the only claim over which it has original jurisdiction, it declines to exercise supplemental jurisdiction over the plaintiffs' state law claims. 28 U.S.C. § 1367(c).

An appropriate order follows.

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facilities. Am. Comp. at ¶ 85. If following the government defendants' advice would have eliminated the risk of E. coli exposure, then the government defendants did not create the harm that the Tittensors suffered.

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v.	:	
COUNTY OF MONTGOMERY OF THE COMMONWEALTH OF PENNSYLVANIA, et al.	:	NO. 02-CV-8011

ORDER

AND NOW, this 8th day of September, 2003, upon consideration of the Motions to Dismiss for Failure to State a Claim brought by the government defendants (Docket No. 16), the Merrymead defendants (Docket No. 14), and defendant Streams (Docket No. 19), and the plaintiffs' response thereto, and after oral argument,

IT IS HEREBY ORDERED that the defendants' motions are GRANTED for the reasons stated in a memorandum of today's date, and it is

FURTHER ORDERED that counsel for the plaintiffs will inform the Court by September 20, 2003 whether the plaintiffs wish to proceed against defendant Kelly Laverdure, who has not moved for dismissal of the complaint.

BY THE COURT:

Mary A. McLaughlin

MARY A. McLAUGHLIN, J.